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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 02/17/11
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

CONSTRUCTION 70, INC., an) 1 CA-CV 10-0137
Arizona corporation,)
)
Plaintiff/Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 28, Arizona Rules of
BOND SAFEGUARD INSURANCE COMPANY,) Civil Appellate Procedure)
an Illinois corporation,)
)
Defendant/Appellant.)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-014200

The Honorable Eileen S. Willett, Judge

AFFIRMED

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T H O M P S O N, Judge

¶1 Bond Safeguard Insurance Company (Safeguard) appeals the trial court's entry of summary judgment and the award of attorneys' fees in favor of Construction 70, Inc. For the reasons that follow, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶2 In 2006, ApexCapital Fund 2, L.L.C. (Apex) entered into a construction agreement with Engle Homes Residential Construction, L.L.C. (Engle Homes), in which Engle Homes agreed to serve as the general contractor in constructing improvements to a subdivision project in Queen Creek known as Sossaman Estates. Under the agreement, Engle Homes was to complete the work described as Phase 1A.

¶3 In June 2007, Apex and Engle Homes executed a first amendment to the construction agreement (amendment) to remove from the contract the construction of a recreation center for the property. Additionally, the amendment reduced the contract amount and budget and required Engle Homes to obtain a "performance and completion bond." The amendment states, "the issuer of the bond shall be committed to complete all improvements to Sossaman Road which [Engle Homes] is obligated to complete," and the bond was to be issued "in an amount of no less than 100% of the costs to complete construction of all improvements to Sossaman Road[.]"

¶4 The same date of the amendment, Safeguard issued a "Subdivision Bond" in the amount of \$1,632,533, with Safeguard as

the surety, Engle Homes as principal, and Apex as obligee. The bond states, in relevant part:

THE CONDITION OF THIS OBLIGATION IS SUCH, that, whereas, said Principal has entered into a Construction Agreement with the Obligee, in which said Principal agrees to construct improvements to Sossaman Estates III - Phase A, including the following:
CONCRETE, PAVING, WET AND DRY UTILITIES

NOW, THEREFORE, if said Principal and/or contractor or subcontractor fails to pay for any materials, provisions, or rented equipment used in, upon, or for or about the construction of the public improvements for performance of the work to be done, or any work or labor done of any kind, in or on such improvements, said surety will pay the same in an amount not exceeding the sum set forth above.

¶15 In October 2007, Engle Homes entered into two construction contracts with Construction 70, a paving and concrete subcontractor. The first contract required Construction 70 to complete the concrete work; the second contract required Construction 70 to complete the paving work.

¶16 Construction 70 completed the concrete and paving work. Construction 70 submitted payment requests to Engle Homes, seeking \$694,812.75 for the concrete work and \$343,247.01 for the paving work (a total of \$1,038,059.76). Engle Homes paid \$82,127.89, but filed for bankruptcy in early 2008. Construction 70 demanded payment from Safeguard under the bond. Construction 70 eventually filed two separate lien foreclosure actions in March and April 2008 against Apex, but voluntarily dismissed both complaints.

¶17 In June 2008, Construction 70 filed a third lien foreclosure action against Apex, this time also naming Safeguard as a defendant. Apex successfully moved to dismiss the complaint on the grounds that Construction 70 had previously filed, and dismissed, the other two complaints.

¶18 Construction 70 moved for summary judgment against Safeguard, and the trial court granted the motion. Construction 70 then filed an application for attorneys' fees and lodged a proposed judgment. Safeguard contested both and filed a motion for reconsideration. The trial court denied the motion for reconsideration. Construction 70 then filed a supplemental application for attorneys' fees.

¶19 The trial court entered final judgment in Construction 70's favor and against Safeguard for \$955,931.87 for the paving and concrete work completed, \$49,663 for attorneys' fees, and pre- and post-judgment interest at 10% per annum. Safeguard timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) § 12-2101(B) (2010).

II. DISCUSSION

A. Summary Judgment

¶10 Summary judgment is appropriate when the evidence presents no genuine issues of material fact. *Orme School v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). We review the trial court's entry of summary judgment de novo. *Wallace v. Casa Grande Union High School*, 184 Ariz. 419, 424, 909 P.2d 486,

491 (App. 1995). Although we view the facts in a light most favorable to the party against whom summary judgment was entered, we will affirm the trial court's decision if it was correct for any reason. *Id.*

¶11 Safeguard relies on *Darner Motor Sales v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 393, 692 P.2d 388, 398 (1984) and *Taylor v. State Farm Mut. Ins. Co.*, 175 Ariz. 148, 854, P.2d 1134 (1993) to argue that extrinsic evidence of a contract is admissible in determining what the contract is intended to mean, so long as that evidence is consistent with a reasonable reading of the contract's language. Where more than one reading of a contract is supported by extrinsic evidence, Safeguard argues, interpretation of the contract is a factual issue to be decided by a jury rather than at summary judgment. Construction 70 argues *Darner and Taylor* do not apply because the analyses were applicable to different types of insurance contracts than the bond presented here. Construction 70 contends that even under *Darner and Taylor*, the trial court nevertheless correctly entered summary judgment.

1. The Bond

¶12 The bond pertinent to Construction 70's claim is clearly a payment bond, as opposed to a performance bond, because it obliges the surety, Safeguard, to pay for "materials, provisions, or rented equipment used in, upon, or for or about the construction of the public improvements for performance of the work" if the principal, Engle Homes, fails to pay.

¶13 Engle Homes did, in fact, fail to pay Construction 70 for its work completed on Sossaman Estates under the paving and concrete contracts. Safeguard contends, however, that the bond limits Safeguard's obligation to pay for work done only on "construction of *public* improvements." Safeguard argues that under the language of the bond itself, summary judgment was inappropriate because "[n]ot all concrete, paving, or utility work is a public improvement, such as when that work is done on individual lots within a subdivision." Safeguard refers to Sossaman Road as a "public arterial road" "outside the subdivision," "not . . . limited in its use to visitors to the Sossaman Estates subdivision," but otherwise does not define what a "public improvement" is.

¶14 We construe the provisions of a bond "most strongly" against Safeguard, the paid surety. *American Radiator & Standard Sanitary Corp. v. Forbes*, 259 F.2d 147, 150 (9th Cir. 1958). Our review of the record supports Construction 70's position that "no work was done for a public entity" under the construction agreement. Additionally, no work was completed on individual lots. Construction 70 completed paving, installed concrete curbs, gutters, sidewalks, and public driveways on the portions of Queen Creek Road, Sossaman Road, and public streets contained within Phase A. These are public improvements. See *Home Builders Ass'n of Central Arizona v. City of Scottsdale*, 187 Ariz. 479, 483, 930 P.2d 993, 997 (1997); *City of Tucson v. Farness*, 19 Ariz. App. 458,

459, 508 P.2d 345, 346 (1973). Therefore, we conclude the bond ensuring payment for the "construction of public improvements" provides coverage for Construction 70's pavement and concrete work.¹

2. The Construction Agreement and Amendment

¶15 Next, we consider whether the existence of the construction agreement and the amendment presented a genuine issue of material fact, as to preclude the entry of summary judgment. In its response to the motion for summary judgment, Safeguard argued that the bond "expressly incorporates by reference the Construction Agreement, as amended, including the specified limitation that bond coverage is limited to improvements to Sossaman Road." Safeguard contended that the absence of any analysis of the construction agreement or the amendment required the court to deny Construction 70's motion for summary judgment.

¶16 On appeal, Safeguard appears to have abandoned its argument that the bond "expressly incorporates" the construction

¹ The September 22, 2006 "Subdivision Bond" guaranteeing the performance of "Sossaman Estates, Phase A - Onsite Improvements" is notably subtitled "Faithful Performance - Public Work." This reference to a "public work" further supports our conclusion that Construction 70's work completed on the Sossaman Estates project is fairly characterized as "public."

agreement and the amendment.² Rather, Safeguard argues the amendment should be considered as extrinsic evidence because it was signed the same date the bond was issued, and because paragraph five of the amendment required Engle Homes to obtain a performance bond.

¶17 The observation that the amendment and bond became effective on the same date is not so significant as to present a genuine issue of material fact regarding the bond's meaning. Particularly in light of the language of the amendment, we discover that nothing in the amendment makes reference to a payment bond. The amendment refers to a performance bond, which has an entirely different purpose than a payment bond. A performance bond, as the amendment states, requires the issuer of the bond to "be committed to complete all improvements to Sossaman Road which Contractor is obligated to complete in accordance with the Construction Agreement." By contrast, a payment bond obliges the surety to pay, not to complete work that the contractor promised to complete.

¶18 Neither the construction agreement nor the amendment are "reasonably susceptible" to the interpretation of the bond asserted by Safeguard, i.e., that the parties intended the payment bond to

² We agree with Construction 70's position that mere reference to the construction agreement does not operate as an incorporation of the agreement or the amendment into the bond. See *United California Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 268, 681 P.2d 390, 420 (App. 1983) ("to incorporate by reference, the reference must be *clear and unequivocal* and must be called to the attention of the other party, he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties...").

cover only improvements made to Sossaman Road. *See Taylor*, 175 Ariz. at 154, 854 P.2d at 1140. Thus, the trial court did not err in finding that the construction agreement and the amendment presented no genuine issue of material fact as to the meaning of the bond.

3. The Engineer's Estimate

¶19 Finally, Safeguard argues summary judgment was inappropriate because another piece of extrinsic evidence, the engineer's estimate, purportedly indicates that the bond was intended to cover the work on Sossaman Road only. The estimate was apparently issued five days before the date that the amendment and bond were executed and reflects the exact dollar amount as the sum of the bond. Safeguard concedes that although the estimate itself was inadvertently omitted from Safeguard's controverting statement of facts, the estimate was later attached to Safeguard's motion for reconsideration. However, at the oral argument on Construction 70's motion for summary judgment, the trial court granted Construction 70's motion to strike the engineer's estimate. Safeguard argues that the trial court nevertheless should have exercised its discretion to consider the estimate in ruling on Safeguard's motion to reconsider.

¶20 Generally, we do not consider arguments raised for the first time in a motion for reconsideration. *See Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, 240, ¶ 15, 159 P.3d 547, 550 (App. 2006). "One of the reasons . . . is that when a new

argument is raised for the first time in a motion for reconsideration, the prevailing party below is routinely deprived of the opportunity to fairly respond." *Id.* On occasion, we will exercise our discretion to consider such matters if "the facts or arguments presented were not available at the time the [ruling] was entered." *Id.* at n. 5, ¶ 16, 159 P.3d at 551, n. 5. This case does not present such a circumstance. Accordingly, we decline to consider Safeguard's arguments relating to the significance of the engineer's estimate in interpreting the bond.³

B. Attorneys' Fees

¶21 Safeguard requests that we reverse the attorneys' fees award because it "far exceeds the fees legally recoverable by Construction 70." We review an award of attorneys' fees for abuse of discretion. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 351, ¶ 32, 972 P.2d 676, 684 (App. 1998). The award of attorneys' fees is discretionary with the trial court, and if there is any reasonable basis for the award, we will not disturb the trial court's judgment. *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 572, ¶ 25, 155 P.3d 1090, 1096 (App. 2007).

¶22 Safeguard contests \$20,581.50 of the total fee award of \$49,633.00, alleging those fees pertain to Construction 70's work on "unrelated" matters and its unsuccessful litigation against Apex. Specifically, Safeguard challenges the fees as follows:

³ In any event, we are not persuaded by Safeguard's argument that the engineer's estimate, entitled, "Sossoman Estates III - Sossaman Road," means that the scope of the bond coverage is therefore limited to work completed on Sossaman Road only.

- \$10,388 in fees for Construction 70's unsuccessful claim against Apex;
- \$3,464 in fees for work expended in Construction 70's defense against claims and lawsuits filed by subcontractors;
- \$6,229.00 in fees associated with Construction 70's payment demands to Engle Homes in the bankruptcy court in Florida; and,
- \$500.50 in fees for "multiple matters" (updating the client, corresponding with opposing counsel, and researching bankruptcy laws).

¶123 Safeguard argues that A.R.S. § 12-341.01 (2010) only permits an award of fees on claims on which Construction 70 prevailed against Safeguard, the party against whom fees are awarded. Construction 70 maintains the trial court did not abuse its discretion in awarding the above-described fees, because "they were necessarily incurred" as a result of Safeguard's refusal to pay under the payment bond.

¶124 Section 12-341.01 is designed to "mitigate the burden of the expense of litigation to establish a just claim or a just defense." In enacting the statute, "[t]he legislature intended that the risk of paying the opposing party's attorneys' fees would encourage more careful analysis prior to filing suit." *Chaurasia v. General Motors Corp.*, 212 Ariz. 18, 29, ¶ 43, 126 P.3d 165, 176 (App. 2006).

¶125 Generally, a victim of a breach of contract may recover damages from the breaching party to compensate for attorneys' fees

and costs expended by the victim to defend a separate suit as a foreseeable result of the breach. *Fairway Builders, Inc. v. Malouf Towers Rental Co., Inc.*, 124 Ariz. 242, 259, 603 P.2d 513, 529 (App. 1979) (holding lessee was entitled to recover from contractor the amount of attorneys' fees and costs incurred in defending action brought by tenant of office building as a foreseeable result of contractor's breach). By the same analysis, it was foreseeable in this case that if Safeguard refused to pay Construction 70 under the payment bond, Construction 70 would likely incur additional attorneys' fees in pursuing payment in the bankruptcy court and defending itself in other lawsuits filed by its subcontractors. We agree with Construction 70 that the contested fees were necessarily incurred as the result of Safeguard's actions. Construction 70 expended a significant amount of time in pursuing payment from Safeguard under the bond. The trial court had a reasonable basis to award attorneys' fees to Construction 70, and we will not disturb the award. See *Fulton Homes Corp.*, 214 Ariz. at 566, 155 P.3d at 1090.

¶126 Finally, Safeguard contends the trial court erred by "compounding" the amount of pre- and post-judgment interest. According to Safeguard, "Construction 70 receives 10% pre-judgment interest between October 4, 2007 and December 8, 2009, and 20% interest from December 9, 2009 forward."

¶127 A judgment creditor is entitled to both pre- and post-judgment interest on a liquidated debt. *Employers Mut. Cas. Co. v.*

McKeon, 170 Ariz. 75, 78, 821 P.2d 766, 769 (App. 1991). In Arizona, this interest is a matter of right, at the rate of 10% per annum. A.R.S. § 44-1201(A) (2010); *Imperial Litho/Graphics v. M.J. Enterprises*, 152 Ariz. 68, 74, 730 P.2d 245, 251 (App. 1986). The date from which pre-judgment interest commences is left to the trial court's discretion. *Trus Joist Corp. v. Safeco Ins. Co. of America*, 153 Ariz. 95, 110, 735 P.2d 125, 140 (App. 1986).

¶128 We conclude the trial court did not abuse its discretion in awarding pre-judgment interest from October 4, 2007, the date Construction 70 entered into the paving contract. Because Safeguard refused to pay the amount due when judgment was entered, the post-judgment language is now applicable and therefore the post-judgment interest begins to accrue at the rate of 10% per annum. Thus, no error occurred with respect to the amount of interest awarded.

C. Costs and Attorneys' Fees on Appeal

¶129 Construction 70, as the prevailing party, is entitled to an award of costs on appeal. See A.R.S. § 12-341. Construction 70 has also requested an award of reasonable attorneys' fees pursuant to A.R.S. § 12-341.01. After considering the relevant factors, we award Construction 70 reasonable attorneys' fees in an amount to be determined upon Construction 70's compliance with Rule 21 of the Arizona Rules of Civil Appellate Procedure.

III. CONCLUSION

¶130 For the foregoing reasons, we affirm the trial court's ruling in all respects, and grant Construction 70's request for an award of fees in a reasonable amount on appeal.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

DONN KESSLER, Presiding Judge

/s/

DANIEL A. BARKER, Judge